***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

*To be argued by*
LEON H. TYKULSKER

75-7608

Original

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IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

IRVING SANDERS, *Plaintiff-Appellee,*

—against—

LEON LEVY, *et al., Defendants-Appellants.*

EGON TAUSSIG, *Plaintiff-Appellee,*

—against—

SIDNEY M. ROBBINS, *et al., Defendants-Appellants.*

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees,*

—against—

ERIC HAUSER, *et al., Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



## BRIEF OF DEFENDANTS-APPELLANTS OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY AND JACK NASH

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## STATEMENT OF CASE

### Preliminary Statement

This is an appeal under 28 U.S.C. §1291 by defendants from an interlocutory order and decision of the United States District Court for the Southern District of New York (Griesa, J.) issued in connection with plaintiffs' motion for class action treatment of certain claims herein. Among other things, the Court decided that the action was properly maintainable as a class action under FRCP Rule 23(b)(3); and it directed defendant Oppenheimer Fund, Inc. to pay the substantial costs involved in ascertaining and identifying the names and addresses of prospective class members in order to enable plaintiffs to meet the obligations imposed on them by FRCP Rule 23(c)(2) to give class members notice of the pending action. Plaintiffs have stated that they would terminate prosecution of this action as a class action if they were required to bear the expense of ascertaining the names and addresses of members of the prospective class. The decision of the Court appears at page 169 of the Appendix and its Memorandum Order appears at page 188. The text of FRCP Rules 23(b)(3) and 23(c)(2) are set forth in an addendum at the end of this brief.

## Summary of Proceedings in the District Court

Plaintiffs, shareholders of defendant Oppenheimer Fund, Inc. (the "Fund"), commenced three independent actions in 1969 which were consolidated for all purposes by order of the District Court. Plaintiffs seek to maintain this action on behalf of themselves and a class of 121,000 other shareholders of the Fund who acquired its shares during the two year period from March 28, 1968 through April 24, 1970.

The defendant Fund is an open-end investment company registered under the Investment Company Act of 1940. Fund shares are offered for sale and sold to the public on a continuing basis. Fund shares may be purchased at the public offering price which is based on the net asset value plus a stated service charge. Net asset value is the proportionate interest of a share in the value of the Fund's assets, including its investment portfolio. Shareholders of the Fund who wish to liquidate their interests do so by selling the shares back to the Fund at net asset value (A-60, A-130-31).* Other defendants herein are Oppenheimer Management Corporation (the "Manager"), the investment adviser to

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* References are to pages in the Appendix filed herein.

the Fund; Oppenheimer & Co., a broker-dealer member firm of the New York Stock Exchange which controls the Manager, and individual directors of the Fund.*

The complaints herein (A-10, A-22, A-38) allege that defendants caused the Fund to overvalue restricted securities thereby inflating the net assets of the Fund and causing a concomitant overvaluation of Fund shares sold to the public and/or redeemed by the Fund and, in addition, causing the payment of excessive fees to the Manager under its investment advisory agreement with the Fund. Plaintiffs further claim that during the relevant period defendants caused the Fund to file prospectuses and issue periodic reports that failed to disclose adequately the acquisition of restricted securities, the methods employed in the valuation of restricted securities and the limitations on the marketability of such restricted securities, in violation of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the rules promulgated under said Acts

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* Individual defendants, not all of whom have been served, include Leon Levy, Jack Nash, Edmund T. Delaney, Hon. Emanuel Celler, Eric Hauser, Joseph M. McDaniel, Jr., Prof. Sidney M. Robbins and Murray Graham.

and fiduciary obligations under state law. The complaints are brought individually on behalf of the plaintiffs and representatively on behalf of all persons who purchased Fund shares subsequent to March 15, 1968; in a separate count, each of the plaintiffs sues derivatively on behalf of the Fund to recover alleged overpayments made by the Fund in connection with redemption of Fund shares during the relevant period. The plaintiffs seek to recover for themselves and the class of Fund purchasers the amount of their claimed overpayments and they seek an accounting to the Fund for damages sustained by it in connection with the redemption of its shares and for all fees received by the Manager. The complaints further seek to have the investment advisory agreement and distribution contract between the Manager and the Fund voided and they also request an award of costs and disbursements, including fees of attorneys and accountants.

In their amended answers (A-47, A-59, A-73), defendants deny the material allegations of the complaints and assert various affirmative defenses. Among other things, the answers allege that restricted securities never exceeded 10% of the value of all of the Fund's assets, that the restricted securities were at all times carried at their

fair value as determined in good faith by the Board of Directors of the Fund as required under Section 2(a)(41)(B)(ii) of the Investment Company Act of 1940 and that there was fair, adequate and timely disclosure by the Fund of investments in restricted securities. In addition, the defendants have alleged that setoffs should be allowed to the extent that overvaluation of Fund securities resulted in overpayments in connection with redemption of Fund shares.

Plaintiffs have demanded a jury trial.

After institution of the actions, plaintiffs submitted interrogatories which have been answered by the defendants and plaintiffs have taken the depositions of some of the defendants. Defendants' interrogatories have been answered by the plaintiffs.

By motion dated March 30, 1973, plaintiffs applied to the Court for an order authorizing the consolidated action to be maintained as a class action on behalf of all persons who purchased shares of the Fund during the period from March 28, 1968 to April 24, 1970 (A-116). The motion was decided on May 15, 1975 (A-169), after plaintiffs had taken the deposition of the Fund's transfer agent concerning the costs and methods of determining the names and addresses of would be members of this class. Thereafter, all parties moved for reargumant and on October 1, 1975 there was filed the order of the Court which is appealed from herein (A-188).

## Summary of Decision and Order of the District Court

In its opinion of May 15, 1975 (A-169), the District Court concluded that the action could be maintained as a class action under FRCP 23(b)(3) and that the class should consist of all persons who purchased Fund shares between March 15, 1968 and April 24, 1970. The Court further decided that the Fund should bear the expense involved in providing to plaintiffs the names and addresses of class members to enable plaintiffs to mail the necessary class action notices and that plaintiffs would be responsible for preparing and mailing such notice.

The Court rejected defendants contentions that the action was not manageable as a class action. It also rejected plaintiffs' attempt to avoid the expense of identifying class members by limiting the class to those purchasers of Fund shares who were still current shareholders, whether or not class members. The Court also rejected defendants' claim that the class should be limited to those who purchased Fund shares before April 25, 1969.

After all parties moved for reargument, the Court entered a Memorandum Order (A-188) which corrected the

opening date of the class to March 28, 1968; directed that the cost of identifying class members should be borne by the Fund without prejudice to its right, at the conclusion of the action, to make whatever claim it would be legally entitled to make for reimbursement by other parties; and authorized the mailing of the class notice, at plaintiffs' expense, in a regular Fund mailing provided the notice is sent only to class members.

Summary of Facts Relevant to the Class Notice and Manageability of the Action as a Class Action

As of March 31, 1973, when the motion for class action determination was made, the Fund had under management net assets of approximately $523,243,000. As of said date, there were 67,726,541 shares of the Fund outstanding owned by approximately 173,957 shareholder accounts, of which approximately 86,063 were direct shareholder accounts and 87,894 were shareholder accounts owned by planholders of Oppenheimer Systematic Capital Accumulation Program ("OSCAP") (A-131). OSCAP is an investment company of the unit investment trust type, registered under the Investment Company Act of 1940, which holds Fund shares on behalf of

its planholders. OSCAP is organized as a custodianship which issues "plans" to participants, each plan representing an undivided interest in units of Fund shares. When the account of an OSCAP planholder is liquidated, the custodian sells the proportionate number of Fund shares to the Fund and the proceeds are credited to the OSCAP planholder.

Class Notice

During the period covered by plaintiffs' proposed class (i.e., March 28, 1968 through April 24, 1970), there were approximately 121,000 shareholder accounts which purchased Fund shares. Of this total, 41,400 were new shareholder accounts of the Fund, 54,600 were new purchasers of OSCAP plans and 25,000 were shareholder accounts or holders of OSCAP plans which had previously owned Fund shares and acquired additional shares during the relevant period (A-133). However, there is a constant turnover of shareholder accounts and many accounts which acquired shares during the relevant period are no longer shareholders or planholders (A-139).

The names and addresses of the shareholder accounts

of the Fund, including members of the class, are contained in magnetic computer tapes which are in the possession of Investment Company Services Corporation, the transfer agent of the Fund (A-195).* However, members of the class cannot be identified by direct reference to existing tapes. New computer programs must be designed to screen shareholder and planholder records and machine processes must be employed by the transfer agent in order to extract from the existing tapes the names and addresses of the purchasers which acquired shares during the relevant period. It is the cost of such programming and procedures, with attendant labor costs, that make up the expense of identifying the names and addresses of members of the class (A-256).* As of October 10, 1973, the transfer agent estimated that these costs would total

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* References are to the deposition of the Fund's transfer agent, Investment Company Services Corporation, by Messrs. Wouters and Sebastian, its Comptroller and Director of Systems and Programming, respectively, and additional information furnished by the transfer agent. The deposition was taken by plaintiffs' counsel on July 18, 1973; additional information, which was requested by plaintiffs' counsel during the course of the deposition, was forwarded by the transfer agent on October 10, 1973. The deposition and said additional information are not part of the Record on Appeal herein, but copies were submitted for the consideration of the Circuit Court on December 8, 1975, and pertinent portions are set forth in the Appendix.

approximately $16,580. Needless to say, in the more than two years which have elapsed since that date, inflation has caused such costs to increase substantially.

Defendants maintained in the Court below, as they do here, that where, as in this case, the purpose of identifying members of the class is to enable plaintiffs to send the initial class notice required by FRCP Rule 23 (c)(2), such cost is part of the notice cost which plaintiffs are required to bear.

Plaintiffs have declared that they will not bear the expense of identifying new class members and have stated that if they were required to pay such costs they would "be unable to continue prosecution of this consolidated action as a class suit" (A-144, A-147, A-149).

In order to eliminate the expense of identifying class members and thereby reduce the costs of notice, during the course of the protracted proceedings in the Court below concerning the class action motion plaintiffs sought to modify the class description by eliminating from the class those persons who were not current shareholders at the time of mailing of the class notice, and plaintiffs urged the Court to direct that the notice could be inserted in a regular mailing sent by the Fund to all of its current

shareholders (A-143-44, A-149-50). Defendants opposed the mailing of a class notice to all current shareholders on the grounds that such a mailing would have a serious adverse effect on the Fund, since there were many current shareholders who were not members of the class and such notice might well precipitate a substantial demand for redemption by them having some of the unfortunate effects of a run on a bank (A-138, A-140). It was in the context of opposition to the sending of a class notice to all current shareholders that the defendants opposed the proposed modification of the class (A-138-41, A-132-35).

The Court below rejected plaintiffs' proposal as prejudicial to potential class members in terms as follows (A-175):

> ". . . in my view, plaintiffs' proposal would involve an arbitrary reduction in the class. If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares."

The Court then went on to rule that the cost of identifying the class members was to be borne by the Fund, saying (A-175):

> "Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense."

We do not believe that the Court's conclusion is sound on the facts or warranted by the law. The Court's decision is based on the unarticulated premise that the cost of identifying members of a class is not an essential component of the notice costs which are required to be borne by plaintiffs in a class action. Moreover, neither the plaintiffs, who have declared they would not maintain the action as a class action if required to bear this cost, nor defendants regard the sum involved as "relatively modest". Finally, there is no factual basis for the Court's assumption that the cost of identification would be materially lower if the class members were limited to purchasers during the relevant period who are current shareholders at the time of mailing the notice; on the contrary it would appear that the same computer programming and other procedures would be required in both cases.

Manageability of Action as a Class Action

The gravamen of the claims in this action is that restricted securities held in the Fund's portfolio

were overvalued during the two year period 1968-1970. During this period, the Fund owned thirteen different restricted securities.

If this action is permitted to proceed as a class action, proof and findings will be required as to the extent of overvaluation, if any, of each of the thirteen restricted securities on substantially each of approximately 200 business days during the relevant two year period. This complex skein of evidence will be required because shares of the Fund were sold and redeemed in substantial volume on almost every business day throughout the relevant period.* Thus, as to each of the 121,000 shareholder accounts which are members of the class, it will be necessary to ascertain each date on which such account purchased or otherwise acquired additional Fund shares (for example, through reinvestment of dividends) and each date on which such account sold Fund shares, in whole or in part, as well as the extent, if any, as to which each

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* For example, on March 28, 1968, the date of the Fund's lowest total net assets during the relevant period, sales and redemptions were 18,549 and 16,364 shares, respectively; on November 11, 1969, the highest daily total net assets, sales and redemptions were 58,170 and 14,000 shares, respectively.

restricted security was overvalued or undervalued on such date. The liability of the defendants is individual to each class member and exists only if one or more restricted securities were overvalued on the date any individual purchase or sale of Fund shares was made.

The difficulties of determining whether the defendants are liable to any one or more of the 121,000 members of the class, and if so the extent of such liability in each case, will be exacerbated by the fact that plaintiffs have demanded a jury trial. The problems are further complicated by the relatively small dollar amounts on the average which will be involved. In response to defendants' interrogatories seeking to ascertain details as to plaintiffs' claims concerning the alleged overvaluations and the damages sustained by the class, plaintiffs claimed that by reason of the alleged overvaluations, the class members paid $1,481,000 more than was proper in connection with purchases of Fund shares, that the Fund overpaid $226,000 on account of redemptions, and that the Manager received excess management fees of $75,000 by reason thereof (A-160, A-164, A-165). This response is substantially identical with estimates made by plaintiffs' counsel

in an affidavit in July 1974, which estimates were admittedly based solely on counsel's alleged experience "regarding appropriate discounts for comparable restricted securities", since plaintiffs conceded they had not retained an expert in connection with the determination of the fair value of the restricted securities (A-152).

Since plaintiffs have no expert basis for estimating damages, the reliability of the amounts may be questioned, and it may be assumed that their estimates do not err on the conservative side. Nevertheless, it is noteworthy that even on their own figures, the damages claimed for the average account would be no more than $12.24.* In fact, the average recovery probably would be less, since plaintiffs' estimates do not appear to take into account the amounts which may be set off with respect to class members who have redeemed "overvalued" shares during the relevant period. It may be observed that in the Court below, the defendants estimated

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* As of March 31, 1973, 67,726,541 shares of the Fund were outstanding and were owned by approximately 173,957 shareholder accounts (A-131), for an average of 391 Fund shares per account. Thus, the average damages for the 121,000 shareholder accounts who may be members of the class approximates $12.24. As of the commencement of this action, plaintiffs Shaev and Sanders owned 45.071 and 209.823 shares, respectively, and accordingly their damages would be proportionately less than average. Plaintiff Taussig owned 2,369.363 shares at the commencement of the action and redeemed 337.39 during the relevant period (A-108, A-98, A-112-13).

that even if the restricted securities had been overvalued by as much as 10%, such overvaluation would have amounted to not more than 4/5 of 1% of the purchase price and as little as 1/5 of 1% of the purchase price, depending upon the time that the class member purchased his securities (A-131-32). As of March 31, 1973 when the average account holding was approximately 391 shares, the Fund had net assets of $523,253,571, or a net asset value per share of $7.72. Thus, the average net asset value of each account was approximately $3,000. If the range of 1/15 to 4/15 of 1% were applied to such average account, then the damages would range from $2.00 to approximately $24.00 per average account, depending upon the date of purchase of shares.

Where, as here, the litigation will be substantially prolonged by reason of the necessity of establishing, as to each member of the class, (i) whether or not there is any liability to such member and (ii) if there is any liability, the amount thereof and where, at most, the amount of damages which might be recovered on average is so insignificant, neither the trial Court nor the litigants should be subjected to the burden and expense which will be caused by permitting this action to be maintained as a class action.

## STATEMENT OF ISSUES

1. In a class action, is the substantial cost of identifying class members for the purpose of enabling plaintiffs to send the initial class notice required by FRCP 23(c)(2) a part of the cost of notice to be borne by plaintiffs or may the defendants (or some of them) be required to pay such costs of identification?

It is submitted that such expenses must be borne by plaintiffs even where, as here, plaintiffs have indicated that they will not maintain the actions if they must bear such identification costs.

2. Is this action manageable as a class action?

It is submitted that this action is not manageable as a class action and should be dismissed as such.

## SUMMARY OF ARGUMENT

Imposition of the cost of class identification on defendants is contrary to the language of FRCP Rule 23(c)(2) and prevailing decisional law, which establish that the identification of class members is an inherent part of the notice procedure, and therefore is required to be borne by plaintiffs. The cost of extracting the names and addresses of class members from records on tape cannot and should not be logically differentiated from the costs of printing the notice, procuring envelopes, stuffing the envelopes and postage which have all been held to constitute part of the cost of class notice. Such identification costs would similarly be chargeable to the plaintiffs under the federal discovery rules, which preclude compelling one party to make compilations or refine statistical information which the other party might accomplish for himself by obtaining the data in its raw form.

The District Court improperly allocated the cost of class identification to the defendant Fund because it found that (i) the expense is relatively modest and (ii) the defendants' position on class definition resulted in additional expense of class member identification. Both conclusions are unsound.

Under the standards established by FRCP Rule 23(b)(3), this action is not authorized to be maintained as a class action.

There is not a sufficient predominance of common questions of law and fact since the alleged liability of the defendants for alleged overvaluation of restricted securities is individual to each class member according to the date of his purchase or sale of Fund shares, and the asserted statutory violations cannot be adjudicated on a comprehensive class basis. Moreover, formidable problems of proof and findings of damages to individual class members, which on average are relatively minute, render this action unmanageable as a class action.

Although the order appealed from is interlocutory, it is appealable under the collateral order doctrine.

In view of the foregoing, class action status herein should be denied. If, nevertheless, this action is permitted to proceed as a class action, the plaintiffs should be directed to pay the costs of identifying the members of the class to whom notice is sent pursuant to Rule 23(c)(2).

## ARGUMENT

### POINT I

### The Cost of Identifying Class Members to Whom Notice Must be Sent Pursuant to Rule 23(c)(2) Should be Borne by Plaintiffs

FRCP Rule 23(c)(2) provides in relevant part:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

The instant action is a class action maintained under subdivision (b)(3) of the Rule, namely, one in which the Court below found that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members (A-170).

It is now well established that in such a class action, notice of the action must be mailed to all class members who can be identified by name and address through a reasonable effort and that the cost of such notice must be borne in the first instance by plaintiff. This Rule was enunciated in this Circuit in "Eisen III", Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), petition for rehearing en banc denied, 479 F.2d 1020, and

services required to extract from tapes the identity of

thereafter conclusively established by the Supreme Court in "Eisen IV", Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Both this Circuit and the Supreme Court made clear that if plaintiff did not accept this expense, the class action could not be maintained. Defendants may not be compelled to finance a class action against themselves. As the Supreme Court said in Eisen IV (417 U.S. at 179):

> "[T]he plaintiff must pay for the cost of notice as a part of the ordinary burden of financing his own suit."

In imposing the cost of identifying the shareholders on defendants in the instant case, the Court below stated as one of its reasons that "here the expense is relatively modest" (A-175).* Insofar as this may reflect sympathy for the unwillingness or inability of plaintiffs to meet the requisite costs, it is not consonant with the law. In Eisen IV, supra at 176, the Supreme Court stated:

> "There is nothing in Rule 23 to suppose that the notice requirements can be tailored to fit the pocket books of particular plaintiffs."

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* In July 1973, the transfer agent estimated that the expense would amount to approximately $16,500 to ascertain the members of the class (A-254, A-222-23, A-225, A-219, A-257, A-239). In view of the inflationary trend of our economy it can be expected that this amount will now be greater. Even if the costs were to remain at $16,500, this is not a trivial amount, especially if the defendants should prevail on the merits and should have to face the problem of seeking to recover such costs from the plaintiffs.

Since the cost of identifying class members is

Thus, the relative financial capabilities of the parties are not relevant to a determination of which party is required to bear the expense of class identification for the purpose of notification under Rule 23. As observed in Popkin v. Wheelabrator-Frye, Inc., CCH Fed. Sec. L. Rep. ¶95,068, at p. 97,748 (S.D.N.Y. 1975) (not officially reported), which held that the corporate defendant should not subsidize the expense of notice because it is in a better position to pay than the plaintiffs:

> "Should the corporate defendant in such a suit prevail on the merits after laying out the initial expense of notice to the class, it would in most cases find it impossible to obtain reimbursement."

A. The Identification of Class Members is an Inherent Part of the Notice Procedure and the Cost Therefor Should be Borne by Plaintiffs

Neither Eisen III nor Eisen IV indicate that consideration was given to the question whether the process of identifying class members could or should be treated separate and apart from the notice process. No such separation can be derived from Rule 23(c)(2). On the contrary, that Rule treats identification as an essential component of the requisite notice in that the Court is required to direct to class members the best notice practicable, "including individual notice to all members who can be identified through

reasonable effort". Thus, the Rule itself contemplates that the nature of the notice is dependent on the available identification process.

The cost of printing the notice, procuring envelopes, stuffing the envelopes and postage for the envelopes have all been considered part of the cost of class notice. E.g., Herbst v. International Telephone & Telegraph Corporation, District Court Opinion reprinted in Appendix, 495 F.2d 1308, 1324 (2d Cir. 1974). The cost of obtaining the name and address to be affixed to the envelope is in no way different from these other costs, and substantially all of the relatively few cases in point have so treated it.

While the decisions of the District Courts in the Second Circuit which antedate the decision of this Court in Eisen III have sometimes allocated the cost of identification to the defendants, this was done in each case upon the basis of the view, since rejected, that there was discretionary power to apportion the financial burden of giving notice under Rule 23. We know of no case which has expressly held that the process of ascertaining the names and addresses of members of the class is not an inherent part of the

individual notice requirement.

Thus, for example, in Berland v. Mack, 48 F.R.D. 121, 131-33 (S.D.N.Y. 1969), the cost of furnishing notice included the cost of identifying the names and addresses of the members of a class consisting of all transferees of stock of defendant Great American Industries, Inc. during a specified time period. The identification required, among other things, a search of the transfer sheets kept by the company's transfer agent and communication with brokers acting as nominees for the beneficial owners. The Court allocated to the corporate defendant a portion of "the cost of notice", which was treated by the Court as including the cost of the identification of class members. It did so on the (now impermissible) ground that "the decision as to how the cost of notice is to be allocated between the parties appears to be an appropriate area for exercise of our discretion. . . ." Id. at 131. (Emphasis supplied.) The Eisen III and Eisen IV decisions have terminated this discretion, but the Berland ruling that the cost of identification is a component of the cost of notice remains sound authority.

This conclusion was shared by the Court in Grad v. Memorex Corporation, 61 F.R.D. 88 (N.D. Cal. 1973), which

concerned a class of approximately 60,000 persons who purchased the stock of the named defendant during a stated period. The Grad case was decided after this Court's decision in Eisen III. The Court there and the parties apparently concurred that the cost of identifying members of the class is part of the cost of notice. Said the Court (at p. 103):

> "Plaintiffs here, unlike Mr. Eisen, are willing to bear the full expense of identifying and notifying class members." (Emphasis supplied.)

A recent District Court decision in this Circuit also imposed identification costs on the plaintiff. Herbst v. International Telephone & Telegraph Corporation, District Court opinion reprinted in Appendix 495 F.2d 1308 (2d Cir. 1974). There, as in the instant case, computer tapes of the defendant corporation contained the identities of members of the class, shareholder-recipients of an exchange offer by defendant. Defendants there were required to provide the plaintiffs only with "listings or materials in their possession useful for the notification of class members." Id. at 1325. In the instant case, defendants have not sought to withhold such materials in their possession -- that is, the raw materials (tapes) from which class members can be

identified. However, the defendants should not be compelled to assume plaintiffs' burden of refining this material in order to effect the identification.

The pre-Eisen opinion in Dolgow v. Anderson, 43 F.R.D. 472, 498-501 (E.D.N.Y. 1968), appears to recognize that the cost of identification is a component of the cost of notice. To minimize such costs the Court concomitantly endeavored to limit the costs of identification.

In B & B Investment Club v. Kleinert's, Inc., CCH Fed. Sec. Law Rep. ¶94,451 at pp. 95,572-73 (E.D. Pa. 1974) (not officially reported), it was unquestioned that the identification of class members was an integral part of the cost of notice to be borne by plaintiffs. In State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 494 (N.D. Ill. 1969), a class action under the antitrust laws involving thousands of school districts and libraries across the nation, it was considered an obligation of the plaintiffs to "prepare a mailing list of all members of their classes". Accord, Lamb v. United Security Life Company, 59 F.R.D. 25, 42-43 (S.D. Iowa 1972); Brennan v. Midwestern Life Insurance Company, 259 F. Supp. 673, 684 (N.D. Ind. 1966).

Although the cases in point are limited in number,

there prevails a consistent judicial recognition that the identification of class members is an essential component in the notice procedure under Rule 23 and that the cost of such identification is a constituent of the cost of notice.

B. If Discovery Rules were Applicable, the Cost of Identifying Class Members is Properly Chargeable to Plaintiffs

Although the discovery rules are not here applicable except by way of analogy, it is pertinent to note that if identification of class members in the circumstances here present had arisen in the ordinary course of discovery, the costs of such identification would be properly chargeable to plaintiffs.

The identification of shareholder accounts which are members of the class does not involve the production of existing records. Rather, it requires the preparation of an appropriate series of computer programs and machine processes to scan existing records on tape and then extract and reproduce the pertinent information. The cost of identifying class members results from the necessity to pay for the human and machine services required in the process of devising programs and applying them to obtain the requisite information from the tapes.

Under Rule 33(c) of the Federal Rules of Civil Procedure defendants would not have to bear the cost of programming and processing the company records in order to identify class members. That subdivision of the Rule is designed to afford protection to parties, such as the defendants here, who have records from which the desired information may be compiled. It provides:

> "(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

By virtue of Rule 33(c), "ordinarily a party will not be required to 'make research and compilation of data not readily known to him' -- at least if the data is equally available to the interrogating party." 4A Moore's Federal Practice ¶33.20, at p. 33-103 (2d ed. 1974). This is consonant with the long-standing rule applied in Koncyakowski v. Paramount Pictures, 20 F.R.D. 588 (S.D.N.Y. 1957). There, the Court declared (at p. 593):

> "[T]he general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents pursuant to Rule 34 of the Federal Rules of Civil Procedure . . . "

Koncyakowski involved a treble damage action under the Sherman and Clayton antitrust acts. The plaintiff sought, through the use of interrogatories, a statement of the distances between forty named theatres operated by the defendant and a list of titles of all motion pictures produced or distributed by defendants which were exhibited in twelve named theatres during a period of approximately twenty years. The Court ruled that these demands were oppressive and granted the defendant the right to deliver to the plaintiff the books and records which contained the information sought.

In Tytel v. Richardson-Merrill, Inc., 37 F.R.D. 351 (S.D.N.Y. 1965), plaintiffs moved for an order compelling defendant to answer certain interrogatories seeking the names and addresses of persons with whom the defendant had communicated concerning the drug defendant produced, as well as the dates and natures of the communications, and the use which was made of the communications by the defendant. The defendant indicated that the information sought by the interrogatories could be found in 107,480 documents under subpoena to a

congressional subcommittee. Since the documents were recorded on microfilm and the defendant offered to allow the movants to examine the microfilm in lieu of answering the interrogatories, the Court denied the plaintiffs' motion.

See also, Triangle Mfg. Co. v. Paramount Bag Co., 35 F.R.D. 540, 542-43 (E.D.N.Y. 1964); United States v. Renault, Inc., 27 F.R.D. 23, 27-28 (S.D.N.Y. 1960); Erone Corporation v. Skouras Theatres Corporation, 22 F.R.D. 494, 501 (S.D.N.Y. 1958); United Cigar-Whelan Stores Corporation v. Philip Morris Inc., 21 F.R.D. 107 (S.D.N.Y. 1957).

No cases have been found in which the protection of Rule 33(c) was invoked in response to discovery proceedings by plaintiffs in a class suit seeking to ascertain the identity of other members of the class in order to satisfy the notice requirements of Rule 23(c)(2). However, the rationale of the foregoing decisions, now embodied in Rule 33(c), which limit the scope of discovery to available raw material, establish that the same result would obtain under the circumstances attending the instant matter.

Under the federal discovery rules, the cost of identifying class members from amongst all shareholder

accounts would be chargeable to the plaintiffs. This is entirely consistent with the philosophy of the Supreme Court decision in Eisen IV that the cost of notice should be borne by the plaintiff as part of the burden of financing his own suit. It is also in accord with the decision reached in Herbst v. International Telephone & Telegraph Corporation, supra, wherein the defendants were required to provide the plaintiffs with raw materials useful to the notification of class members but were not directed to perfect such material by presenting plaintiffs with a mailing list of such members. Accordingly, the plaintiffs herein should be required to bear the expense of identifying the shareholder accounts which comprise the class they seek to represent.

C. The Court Below Erred in Concluding that Defendants Sought to Have the Class Defined in a Manner Which Would Substantially Increase the Expense of Class Member Identification

The District Court below erroneously concluded that the defendants' position on class definition resulted in additional expense of class member identification. This conclusion, together with the Court's determination that the costs of identification are "relatively modest", constitute the reasons assigned by the Court for the allocation of such

costs to defendant Fund.

Plaintiffs originally sought to represent all persons who purchased shares during the relevant period. (A-116-19) After plaintiffs' motion for class action status had been filed, counsel for plaintiffs took the deposition of the Fund's transfer agent in order to determine the process by which the members of the class could be identified and the costs of such identification for notice purposes. As a result of this deposition, it was learned that a cost of approximately $16,500 would be incurred in culling the names and addresses of members of the prospective class from the computer records of shareholder accounts maintained by the transfer agent for the Fund.

Plaintiffs thereupon urged a modification of the class description to eliminate persons who purchased shares during the relevant period and who were no longer current shareholders of the Fund.* In addition, plaintiffs urged

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* As of August 31, 1973, approximately 68,000 then current shareholder accounts (or 40% of the total of 171,195 accounts) were not members of the class and approximately 103,195 were members of the class, leaving approximately 18,000 class members who were no longer current shareholders as of that date. (A-253, Deposition of Investment Company Services Corporation at p. 142-44)

that notice of the class action be included in a regular mailing sent by the Fund to all current shareholders. (A-145-47)

The need for and expense of class member identification would have been obviated only if the District Court had adopted both of plaintiffs' proposals for class identification and for a blanket notice to all current shareholders. However, the Court properly concluded that it would not be appropriate to subject the Fund and its shareholders to the potential hazard of a broadside mailing to all shareholders. The Court had before it the affidavit of Robert G. Galli, Secretary of the Fund and Administrative Vice President of the Fund's advisor (A-138), that the mutual fund industry and the Fund were in a difficult period in which net redemptions were exceeding sales because of uncertain conditions in the stock market and consequent loss of investor confidence. As was pointed out in the affidavit, it was the experience of the Fund and of the mutual fund industry as a whole that any event which raised questions in the investor's mind in that uncertain climate was likely to cause him to redeem his mutual fund shares. For this reason, any broadside mailing had the potential to trigger a wave of redemptions, like a run on the bank, which might well consume the Fund's liquid

assets and require the forced sale of portions of its portfolio. The Court below did not consider it appropriate to subject the Fund and its shareholders to this potential danger.

So far as we have been able to ascertain, where class members could be identified, no Court in recent years, especially after Eisen III and Eisen IV, has required that notice be sent in a manner that would include nonclass members. Typical Southern District cases which required notice to class members include: Hawk Industries Inc. v. Bausch & Lomb Inc., 59 F.R.D. 619, 625 (S.D.N.Y. 1973); Pearlman v. Gennaro, et al., CCH Fed. Sec. Law Rep., 1973 Decisions ¶94,006 (S.D.N.Y. 1973) (not officially reported); Ostroff v. Hemisphere Hotels Corp., 60 F.R.D. 459 (S.D.N.Y. 1973); Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160, 166 (S.D.N.Y. 1973); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971); and Weiss v. Tenny Corporation, 47 F.R.D. 283 (S.D.N.Y. 1969).

Since blanket notice to all current shareholders was rejected as inappropriate, the class modification urged by plaintiffs would not have materially reduced the cost of class identifications. That cost was attributable to the

services required to extract from tapes the identity of the names and addresses of all shareholder accounts which purchased Fund shares during the relevant period. The identification of all such purchasers would in any case be required, whether or not it was determined that a notice would be sent to only those of them who remained shareholders as of the date of the mailing and any limitation in the class members on this basis would not eliminate the need for and cost of the initial identification process.

Defendants opposed the reduction of the class in the context of opposing the proposed blanket notice to all current shareholders on the grounds that such blanket notice created a threat of irreparable injury to the Fund. However, the position of the defendants on the issue of class definition did not cause any additional expense in obtaining the names and addresses of the members of the class, and therefore, there is no basis for allocating any part of the expense of such identification, let alone the whole thereof, to any of the defendants.

* * * *

Since the cost of identifying class members is an essential component of the notice process, the Federal Rules of Civil Procedure and recent decisions of the Supreme Court and this Court require that such costs be borne by plaintiffs. Even under discovery rules, in the circumstances here present, plaintiffs would be required to bear these costs.

## POINT II

### This Action Is Not Manageable As A Class Action And Should Not Be Maintained As A Class Action

Rule 23(b)(3)* of the Federal Rules of Civil Procedure provides that a class action may be maintained only if, among other things, (1) the action involves common questions of law and fact which predominate over questions affecting only individual members, and (2) a class action, taking into consideration the difficulties likely to be encountered in the management of the action, constitutes the best available means to secure a fair and efficient adjudication of the controversy. The burden of establishing that these requirements have been met is on the plaintiffs. E.g., Bosbes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); 3B Moores

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* Rule 23(b) (3) provides:

> "(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosectuion or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Federal Practice ¶23.45[2] at p. 23-761 (2d ed. 1974). This burden has not been sustained.

City of Detroit v. Grinnell Corp., 356 F. Supp. 1380 (S.D.N.Y. 1972), modified, 495 F. 2d 448 (2d Cir. 1974) involved the proposed settlement of a class action in which there were under 15,000 members. Nevertheless, the concerns there expressed by the District Court equally pertain to the question of manageability herein:

> "Because of the disparity in charges between cities and the various competitive local factors, defendants are ready to contest each of the 14,156 claims on the amount of damages, even though liability may be proven. Assuming, for the moment, that the class action status is resolved in favor of plaintiffs, interesting trial problems are present, since the case is to be tried to a jury. . .[I]t is fair to assume a minimum of one hour for the presentation and defense of each claim. Thus, we can look forward to about 14,000 trial hours on the damage claims alone. With an average of 6 hours a day devoted to actually hearing testimony, the trial will take some 2,300 days or about 11 years. . . .
>
> The questions of administration raised by such a trial are: Do you use the same jury to decide the entire damage issue? Does the same judge preside over this trial to the exclusion of his other more pressing work, such as criminal trials or application for preliminary and permanent injunctions? Or is the judge relieved of all other assignments?" 356 F. Supp. at 1388-89.

In the instant case, proof of liability would involve evidence going beyond that typically required for proof of damages. As previously discussed (supra, p.13 ), if this action is permitted to proceed as a class action, as

to each of the 121,000 shareholder accounts which comprise the prospective class, it will be necessary to ascertain each date on which such account acquired and sold Fund shares, as well as the extent of the overvaluation or undervaluation, if any, of each of 13 different restricted securities on each such date. Since Fund shares were sold to class members on each of approximately 200 business days during the relevant period, with some of these purchasers redeeming all or part of their purchases during this period, the proof of liability may well involve literally millions of calculations.

Where a jury trial has been demanded, as has been demanded by the plaintiffs herein, the problems of manageability are more severe than in non-jury trials:

> "Where one could muster jurors willing to devote themselves so indefinitely in time from their accustomed tasks, is puzzling. And one might relevantly ask -- what public interest could be served by devoting the public's facilities in this way and what just purpose requires such a collossal marshalling of judicial resources and supporting personnel?" Schaffner v. Chemical Bank, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

In addition to these problems, relatively small dollar amounts on the average are claimed. Assuming arguendo, the accuracy of plaintiffs' estimate, the damages claimed to the average account would be no more than $12.24; on defendants'

estimates, even if all restricted securities were consistently overvalued by as much as 10% throughout the entire period, the damages to the average size account would range between $2.00 and $24.00, depending on purchase dates. (See Statement of Case, supra, p. 16 ) One cannot exclude the possibility that plaintiffs' estimates are overly generous and that the ultimate recovery even if liability is established will be very much less. It was this confluence of aggravated administrative problems and small individual claims that this Circuit held to warrant dismissal of the class action in Eisen III:

> "The fact that the cost of obtaining proofs of claim by individual members of the class and processing such claims was such as to make it clear that the amounts payable to individual claimants would be so low as to be negligible also should have been enough of itself to warrant dismissal as a class action." 479 F.2d 1005, 1017 (2d Cir. 1973).

Although the body of decisional law treating difficulties in management of class actions is not extensive, the formidable problems which the instant action will engender are of the very type which courts have found to be inimical to class status. Where class aspects necessitate extensive proof and findings of damages to individual members, as it will in the instant case, class action status has been consistently denied on the grounds of lack of manageability.

Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 431-33 (W.D. Mo. 1973); Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970). Similarly, where the trial will be complicated in order to establish liability to members of the class, as in the instant case, class certification has been denied on grounds of unmanageability and predominance of individual questions. E.g., Morris v. Burchard, 51 F.R.D. 530, 535-36 (S.D.N.Y. 1971). Manageability must also take into account the additional trial complexities that will result from the need to adjudicate substantial incremental issues, such as the setoffs asserted by defendants herein. Cotchett v. Avis Rent A Car System, Inc., supra at 553. Moreover, it has been recognized that manageability is also affected by whether or not the action is to be tried to a jury, as in the instant case, since the problems of proof become even more complicated and taxing of judicial resources. Cotchett v. Avis Rent A Car System, Inc., supra at 553-54; Schaffner v. Chemical Bank, supra at 337.

The aggravated problems of proof which will be encountered in the management of this action as a class action apply equally to the determination required by

Rule 23(b)(3), that this action involves common questions of law and fact which predominate over questions affecting only individual members.

The gravamen of plaintiffs' claims is that the restricted securities contained in the Fund's portfolio were not valued by the Fund's Board of Directors "at fair value as determined in good faith" under Section 2(a)(41)(B)(ii) of the Investment Company Act of 1940. The ultimate issue is thus whether or not the values as fixed by the directors of the Fund were in fact fair. (See Statement of Case, supra, p. 12.)

Accordingly, the alleged liability of the defendants remains individual to each class member. Such liability obtains only if one or more of the restricted securities was overvalued on the date of each individual purchase or sale of Fund shares. Thus, the factual problems are different for each date and the purchasers on any given date have interests that differ from those who purchased on other dates and which conflict with accounts that redeemed on other dates.

Here, the activities allegedly giving rise to liability are not standardized, and, indeed, the asserted statutory violations cannot be adjudicated on a comprehensive

class basis. It is well settled that, under such circumstances, the predominance requirement of Rule 23(b)(3) is not met. E.g., Caceres v. International Air Transport Ass'n, 46 F.R.D. 89, 95-96 (S.D.N.Y. 1969); 3B Moore's Federal Practice ¶23.45 [2] (2d ed. 1974).

The small recoveries for the average account, the large number of accounts that would have to be administered and the time and complications that will be added to the trial of this litigation would be enough by themselves to warrant a finding that this case is not manageable as a class action. This conclusion is reinforced by the discreteness of the questions of fact affecting liability, if any, to each purchaser. In the circumstances, this action should not be permitted to be maintained as a class action.

## POINT III

### This Court Has Jurisdiction To Review The Order And Decision Of The District Court

The order and decision of the District Court are appealable under 28 U.S.C. Section 1291* as a final disposition of rights which are collateral to the cause of action.

The collateral order doctrine is too well established in the type of circumstances present here to warrant extensive discussion. This case is controlled by the decisions of the United States Supreme Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), and in "Eisen IV", Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

In Cohen v. Beneficial Loan Corp., the Court articulated the collateral order doctrine as follows (337 U.S. at 546):

> "This decision appears to fall in that small class which finally determines claims of right separate from, and collateral to, rights

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* Section 1291 provides:

> "Final decisions of district courts.
> The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

In determining the appealability of orders entered in class actions, this Court has resolved the Cohen standard into a three-pronged test, each element of which must be affirmatively established:

(1) whether the order is "fundamental to the further conduct of the case";

(2) whether review of the order is "separable from the merits";

(3) whether the order will cause "irreparable harm to the defendant in terms of time and money spent in defending a huge class action."

Parkinson v. April Industries, Inc., 520 F.2d 650, 656 (2d Cir. 1975); Handwerger v. Ginsberg, ___ F.2d _____ (2d Cir. July 16, 1975), slip. op., No. 75-7095, at 4867.

Applying the standards above set forth, it is evident that the instant case falls within that class of final dispositions which are appealable.

First, the order and decision of the Court below, allocating the costs of class identification to the defendant Fund, is fundamental to maintenance of this action as a class action. The plaintiffs have indicated that they will not continue the class action if they are required to bear the

cost of identifying class members. Thus, as in Eisen IV, the instant determination is "dispositive of [plaintiffs'] attempt to maintain the class action as presently defined." Eisen IV, supra at 172 n. 10; Parkinson v. April Industries, Inc., supra at 657.

Turning to the second element, it is clear that review of the District Courts' decision and order does not involve this Court in a detailed examination of the merits of the action. The determination of the costs of notice and class member identification involve collateral matters unrelated to the merits of plaintiffs' claims. As in Eisen, the District Court in the instant case has rejected defendants' contention that they could not lawfully be required to bear an expense which should be borne by plaintiffs as part of the cost of notice to the members of plaintiffs' proposed class.

Finally, the third requirement of the appealability test is satisfied herein. It is estimated that the class will contain 121,000 members. The time that will be required of witnesses, including directors and officers of the Fund and other defendants, and the expenses for counsel in a class action of this magnitude will be enormously increased by reason of the class action aspects. Such incremental burdens of time and expenses which will necessarily be imposed by the class

action are so substantial as to constitute irreparable injury. Handwerger v. Ginsberg, supra at 4868-69.

The issue of the manageability of this action as a class action also meets the tests for application of the collateral order doctrine and may afford an independent basis for appellate review. In a recent case involving a class of only some 16,000 shareholders, this Court has stated:

> "It may prove to be that in a sprawling class action discrete and aggravated questions of manageability will present questions so important that an immediate appeal from a class action determination will lie."
> Parkinson v. April Industries, Inc., 520 F.2d 650, 658 at n. 9, (2d Cir. 1975)

That question need not be decided at this time, since the right to appellate review is independently based on the issue of allocation of costs of class notice. As in Eisen III, this Court may properly review manageability when raised in conjunction with notice costs. Sound judicial administration would preclude any other treatment.

## CONCLUSION

Under the standards established by FRCP Rule 23(b)(3), this action is not authorized to be maintained as a class action. Individual issues predominate over common ones in this case. Moreover, onerous burdens will be imposed on the trial Court and litigants which are not warranted in view of the small amount of damages recoverable on average by individual members.

If, nevertheless, this action is permitted to proceed as a class action, the plaintiffs should be required to pay the costs of identifying the members of the class to whom notice is sent pursuant to FRCP Rule 23(c)(2). The identification of class members is an inherent part of the notice procedure under Rule 23(c)(2) and the cost of such identification must be borne by the plaintiffs as required by the decisions of this Court in Eisen III and of the United States Supreme Court in Eisen IV.

Accordingly, the order of the District Court which is appealed from should be vacated and set aside and the District Court should be directed to enter an order denying plaintiffs' motion dated March 30, 1973 and dismissing the action as a class action; or, in the alternative, if this Court determines that the action is properly maintainable as

a class action, so much of the order appealed from as concerns the cost of identifying class members should be vacated and set aside and the District Court should be directed to enter an order requiring plaintiffs to bear the cost of such identification as part of the costs of notice, pursuant to FRCP Rule 23(c)(2).

Respectfully submitted,

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ADDENDUM

FRCP Rule 23(b)(3) provides:

"(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisities of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

FRCP Rule 23(c)(2) provides:

"(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

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